In The

Supreme Court of the United States

OCTOBER TERM, 1961

AUG 19 1961

BROWNING, Clerk

No. 335

IOANNIS KOUFOPANTELIS, *et al.*,

v.

CIA. DE NAV. SAN GEORGE, S. A.,

Petitioner,

FANORIOS PANTELOGLOU,

v.

CIA. DE NAV. SAN GEORGE, S. A.,

Petitioner,

DIAMANTIS DRAKOPOULOS, *et al.*,

v.

CIA. DE NAV. SAN GEORGE, S. A.,

Petitioner,

SPIRIDON BARDIS,

v.

CIA. DE NAV. SAN GEORGE, S. A.,

Petitioner,

IOANNIS KOUFOPANTELIS, *et al.*,

v.

CIA. DE NAV. SAN GEORGE, S. A., SANTA MARIA SHIPOWNING & TRADING COMPANY, S. A., CIA. DE NAVEGACION SAN MARTINE, S. A., and PANATHENA TRADING & SHIPOWNING COMPANY,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION AND APPENDIX

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August 18, 1961.

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Cia. de Nav. San George, S.A., a Panamanian corporation, Santa Maria Shipowning & Trading Company, S.A., a Panamanian corporation, Cia. de Navegacion San Martine,

S.A., a Panamanian corporation, and Panathena Trading & Shipowning Company, a Liberian corporation, pray that a writ of certiorari issue to review the judgments and orders of the United States Court of Appeals for the Second Circuit, entered in the above cases on May 26, 1961. A petition for rehearing was denied by the Court of Appeals by order dated June 19, 1961.

Opinions Below and Jurisdiction

The opinions of the United States District Court for the Southern District of New York have not yet been reported and are reproduced at pp. 1a and 5a of the Appendix. The opinion of the United States Court of Appeals for the Second Circuit dated May 26, 1961 has not yet been reported and is reproduced at pp. 9a-19a of the Appendix.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Statement

This petition relates to four libels instituted in December 1955 and October 1956 by former members of the crew of the S/S "Santa Despo," a Panamanian flag vessel owned by Petitioner Cia De Nav. San George, S.A. (hereinafter referred to as San George) until its sale in 1955. All four libels were predicated upon claims for allegedly unpaid wages, vacation pay, overtime, indemnities and discharge pay and, in each instance, additional claims were asserted for double-wages pursuant to Sections 596 and 597 of Title 46, U. S. C. (see Appendix, pp. 20a, 21a). Default decrees were entered against San George in the various libels on April 30, 1959 and June 17, 1959 in the District Court for the Southern District of New York.

Thereafter, on May 20, 1960, San George moved the District Court for orders (1) setting aside its defaults (2) setting aside the judgments entered in favor of libellants and against it, and (3) permitting it to make answer to the libels on such terms as the court might direct. The motions were denied by Cashin, J. on August 2, 1960 (see Appendix, page 5a) and appeals were taken to the Court of Appeals for the Second Circuit from the orders entered therein.

During the period intervening between the entry of the judgments against San George and the denial of the motions to set aside the defaults, the libellants in the Koufopantelis, et al. matter, as permitted both by Admiralty Rule 20 and Rule 69(a) of the Federal Rules of Civil Procedure (see Appendix pp. 24a, 25a) commenced a supplementary proceeding against petitioners Santa Maria Shipowning & Trading Company, S.A., Cia De Navigacion San Martine, S.A., Panathena Trading & Shipowning Company and Saint John Shipping & Trading Corporation in accordance with section 794 of the New York Civil Practice Act (see Appendix page 21a). Cargo & Tankship Management Corporation, the manager of the local finances of petitioners at that time, was also joined as a Third Party in said proceedings but is not a party to this petition. Similarly, inasmuch as the Third Party Saint John Shipping & Trading Corporation was found to have no liability in the proceedings below, it is not a party hereto. The theory upon which libellants based the supplementary proceedings was that funds belonging to San George had been distributed among the above-named shipping companies by Cargo & Tankship Management Corporation at the direction of an agent of San George. Extensive examination of these Third Parties was conducted in the course of which the complex bookkeeping system employed by Cargo & Tankship Man-

agement Corporation and the interrelationship of the other Third Parties were investigated. Libellants Koufopantelis et al. thereafter moved the District Court for an order directing the Third Parties to pay the amount of the judgment previously obtained against San George. The position taken by the Third Parties on the motion was that the examinations which had been conducted failed to prove any indebtedness flowing from the Third Parties to San George or, at the very least, that an issue of fact had been shown to exist with respect to said indebtedness which would require the libellants to pursue the remedy of a summary action pursuant to Section 795 of the Civil Practice Act of the State of New York (see Appendix page 23a). On March 11, 1960 the District Court summarily granted libellants' motion and on March 21, 1960 an order was entered by Palmieri, J. directing the Third Parties to pay the amount of the San George judgment. An appeal was taken by the Third Parties from the order of March 21, 1960, which appeal was consolidated for purposes of argument with the four appeals from the underlying orders denying the motions to set aside the San George defaults.

The appeals in the four libels and in the third-party proceeding were decided on May 26, 1961 (see Appendix, pp. 9a-19a). In its decision, the Court of Appeals sustained the action of the District Court in denying the San George motions of May 20, 1961, holding that the time limitation of Admiralty Rule 39 constituted a complete bar to any relief under Admiralty Rule 28 (see Appendix page 24a), since more than sixty days had elapsed between the date of entry of the default judgments and the motions to set aside said defaults.

In the Koufopantelis, et al. third-party proceedings, the Court of Appeals reversed the order of the District Court insofar as it pertained to Cargo & Tankship Man-

agement Corporation, but affirmed the lower court's order with respect to each of the petitioners herein. The majority of the Court held that adequate evidence had been educed in the proceedings to indicate that assets of San George, the judgment debtor, had been deflected from its creditors to the Third Parties without consideration and in fraud of the libellants, and that the Third Parties had failed to present evidence sufficient to create an issue of fact warranting a trial. In his dissent, Hand, J. asserted his opinion that the relations between San George and the third-party shipping corporations, as well as the nature of the accounting procedure utilized by Cargo & Tankship Management Corporation in managing the affairs of said companies were too complex to be decided summarily and that, accordingly, the decree in the third-party proceeding should be reversed and the issues remanded to the District Court for trial.

Questions Presented

Two basic questions are presented:

1. With respect to the motion relating to the underlying judgments entered against San George in 1959, the question posed is whether Admiralty Rule 39 precludes a hearing on the issue of damages pursuant to Admiralty Rule 28 after the expiration of a sixty-day period subsequent to the entry of a default judgment.

2. The decision in the appeal of the Koufopantelis, et al. third-party proceedings raises the question of the quantum and nature of proof which must be introduced to entitle third-parties to a trial of the issues, a question upon which the Court of Appeals was divided.

Statutes and Rules Involved

The relevant provisions of 46 U.S.C. §§596, 597, the Civil Practice Act of the State of New York §794, §795, Admiralty Rules 20, 28, 39 and 43 and Rule 69(a) of the

Federal Rules of Civil Procedure are set forth in the Appendix hereto.

Reasons for Granting the Writ

The writ should be granted because the general interests of the shipping industry require an interpretation of the applicability, scope and interrelationship of Admiralty Rules 28 and 39, a question not yet passed upon by the Supreme Court of the United States, and because of the division of opinion within the Court of Appeals for the Second Circuit with respect to the nature and extent of the proof which must be presented to establish the existence of a triable issue of fact in third-party proceedings such as those conducted herein.

1. Application of Admiralty Rules 28 and 39

In the Court of Appeals, petitioners urged that the default decrees entered against San George should have been set aside by the District Court as permitted by Admiralty Rule 28 or, in the alternative, that the said court should have taken testimony and proof of the extent of the damages actually sustained by the libellants. Rule 28 directs that the court shall, after pronouncing a default, "proceed to hear the case *ex parte*, and adjudge therein as to law and justice shall appertain" and contains no time limitation such as is found in Rule 39 which also deals with the problem of reopening default decrees (see Appendix page 24a). The existence of these two parallel Rules has evoked discussion by both the commentators and the courts. 2 *Benedict on Admiralty*, §314 (6th ed. 1940). The position heretofore taken in the administration of the rules has been that Rule 28 pertains to "interlocutory" judgments, whereas Rule 39 is to be confined to "final" judgments. *Afghan Motor Co.* v. *The M. V. Silverash*, 46 F. Supp. 306, 308 (S.D. N.Y. 1942). In the instant cases, however,

the Court of Appeals has expressed its opinion that the provisions of Rule 28 are, in fact, restricted by those of Rule 39 and that, accordingly, after the expiration of the sixty-day period set forth in Rule 39 the District Court is powerless to exercise the discretion granted it by Rule 28. It is respectfully submitted that such an interpretation of the two rules is incorrect and that, as separate and distinct entities, they must be deemed to apply to separate and distinct situations.

It should be noted at this point that the docket entries in the various libels refer to the Bardis decree as an "interlocutory" decree, the Panteloglou decree as a "default" decree and the Drakopoulos, et al. and Koufopantelis, et al. decrees each as a "decree pro confesso." In no instance was the decree specified to be final. In view of the nature of the claims asserted by libellants, such descriptions appear particularly apt. Of the judgments aggregating $90,185.29, in excess of one-half stemmed from causes of action allegedly arising under the "double-wage" penalty provisions of 46 U.S.C. §§596, 597 (see Appendix pp. 20a, 21a). Thus, a total of $47,811.00 was summarily awarded by the District Court on the basis of the punitive provisions of the Code with no consideration of whether or not the facts actually brought the respondent company within the scope of the statute. To hold that such an award is final and to thus preclude an examination into the facts allegedly entitling the libellants to the recovery of punitive damages, runs counter to the general concepts which have been adopted in instances of default. As appears in 3 *Benedict on Admiralty* §412 (6th ed. 1940):

> "On defaults, as on contested matters, the proof of damages must be made by witnesses and a reference is almost invariably made."

See also *Cape Fear Towing & Transportation Co.* v. *Pearsall*, 90 Fed. 435 (4th Cir. 1898), wherein it was noted that

> "* * * In common-law cases, damages after a default must be found by a jury. Raymond *v.* Railroad Co., Fed. Cas. No. 11,593; U. S. *v.* White, Fed. Cas. No. 16,686. And, as the effect of a default to appear in an admiralty proceeding is ordinarily the the same as in other actions at law (Miller *v.* U. S., 11 Wall. 268) *such damages must be found by the court upon the testimony taken* (Hightower *v.* Hawthorn, Hemp. 42, Fed. Cas. No. 6,478b)."

Section 596 of 46 U.S.C. provides, in part, as follows:

> "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned *without sufficient cause* shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court * * *." (Emphasis supplied.)

It is clear from its very terms that the statute is designed to impose penalties only where payment has been withheld in an arbitrary and wrongful manner. This interpretation was, in fact, adopted by this Court in *Collie* v. *Ferguson*, 281 U. S. 52, 55 (1930) wherein the following observations were made:

> "The phrase 'without sufficient cause' must be taken to embrace something more than valid defenses to the claim for wages. Otherwise it would have added nothing to the statute. In determining what other causes are sufficient, the phrase is to be interpreted in the light of the evident purpose of the section to secure prompt payment of seamen's wages * * * and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed.

> The words 'refuses or neglects to make payment * * * without sufficient cause' connote, either conduct which is in some sense arbitrary or wilful, or at least a failure not attributable to impossibility of payment. We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible."

See also *McCrea* v. *United States*, 294 U. S. 23, 30 (1935) in which this Court stated that

> "The statute [46 U.S.C. §§596, 597] thus confers no right to recover double wages where the delay in payment of wages due was not in some sense arbitrary, wilful or unreasonable."

The foregoing interpretation of the statute has been consistently followed by the courts. In *Glandzis* v. *Callinicos*, 140 F. 2d 111 (2d Cir. 1944) the court held that

> "It is not every refusal which grounds the penalty. It is arbitrary, unwarranted, and unjust conduct which is sought to be penalized."

Similarly, in *Rodriguez* v. *Gerontas Compania de Navegacion*, 150 F. Supp. 715 (S.D. N.Y. 1957), aff'd. 256 F. 2d 582 (2d Cir. 1958), it was noted that

> " * * * the imposition of the penalty provided in these sections should be made only when the conduct of the ship is arbitrary, unwarranted and unjust."

Despite the foregoing authorities, however, no hearing was ever held upon the merits of libellants' claims for "double-wage" damages. Whereas it is clear that "There must be an adequate showing that respondent has wrongfully and without sufficient cause withheld the payment of wages," *Dendrinos* v. *City of New York*, 86 F. Supp. 688 (S.D. N.Y. 1949), no such showing was ever made by the

Libellants herein. Rather, the District Court awarded these punitive damages solely upon the naked assertions of alleged rights set forth in the various libels.

Accordingly, it is submitted that the judgments entered herein must necessarily be deemed interlocutory in nature and subject to the provisions of Admiralty Rule 28 alone, for to hold otherwise would be to perpetuate the unjust action taken by the District Court in awarding punitive damages without a scintilla of proof as to the validity of the claims asserted.

Even if the Court of Appeals were correct in holding that the sixty-day limitation of Admiralty Rule 39 restricts the power of the District Court to set aside a default pursuant to Admiralty Rule 28, it is respectfully suggested that such limitation cannot properly be extended to the requirement that a hearing be held to ensure a just and equitable result. A court of Admiralty is a court of equity, *The Salvore*, 36 F. 2d 712 (2d Cir. 1929), and, as such, proceeds upon equitable principles unlike a court of law, *Rice* v. *Charles Dreifus Co.*, 96 F. 2d 80 (2d Cir. 1938). In light of this equitable tradition, it was the duty of the District Court, either in the initial instance or when requested by the petitioners, to investigate the factual background of the libels herein by conducting hearings itself or by a reference to Commissioners.

Petitioners submit, therefore, that the court below erred in holding that Rule 39 precluded the District Court from taking appropriate action pursuant to Rule 28 and in failing to direct, at the very least, that a hearing be conducted on the issue of damages as requested by petitioners.

2. Triable Issues of Fact in Proceedings Supplementary to Judgment

In its consideration of the order entered in the District Court on March 21, 1960 with respect to the Koufopantelis et al. supplementary proceedings, the Court of Appeals was divided. As noted heretofore, the majority of the appellate court held that the evidence introduced by the Third Parties was insufficient to create such an issue of fact as would require a trial pursuant to the provisions of the New York Civil Practice Act. Judge Hand, however, differed sharply on this issue, finding that "the relations between the corporations owning the 'Santa ships' were too complicated to decide summarily * * *" (see Appendix page 15a). Thus there was a conflict within the Court of Appeals for the Second Circuit of vital importance to the petitioning Third Parties which justifies review by this Court.

The factual background presented in this matter was complex indeed. It appeared from the examination of the following Third Parties, to wit, Santa Maria Shipowning & Trading Company, S.A. (hereinafter referred to as "Santa Maria"), Cia. de Navegacion San Martine, S.A. (hereinafter referred to as "San Martine"), Panathena Trading & Shipowning Company (hereinafter referred to as "Panathena") and Saint John Shipping & Trading Corporation (hereinafter referred to as "Saint John"), that the New York representative of the Judgment Debtor, San George, was one Pandelis A. Margaronis and that their disbursing agent was, until December 31, 1959, Mar-Trade Corporation (hereinafter referred to as "Mar-Trade").

Each of the Third Parties, which were foreign corporations, owned a foreign flag vessel and for a period of several years, ending on December 31, 1958, Mar-Trade acted as agent for those vessels (which were known on Mar-Trade's records as the "Santa Group"), collecting

their freights and making disbursements for expenses incurred in their operation.

On January 1, 1959, Mar-Trade became inactive and its records were transferred to Cargo & Tankship Management Corporation (hereinafter referred to as "Cargo").

During the Mar-Trade regime, at its request and for its convenience, the freights of the vessels listed above were kept in one group, the "Santa Group," in a special account known as "Mar-Trade's Special Account No. 4". Under the subsequent Cargo management, the practice of maintaining a special bank account for the "Santa Group" was discontinued and the freights of the vessels of the Third Parties were placed in Cargo's Agency Account, which also contained moneys belonging to the owners of approximately forty other vessels with which the Third Parties were in no way associated or connected.

Mar-Trade, and subsequently Cargo, kept records for each of the vessels of the Third Parties and a monthly statement of cash receipts and disbursements was sent to each owner. The bookkeeping entries of Mar-Trade and Cargo were incorrect, containing so many duplications and inaccuracies that the Third Parties as well as the Judgment Debtor, through their New York accountants, requested Mar-Trade and Cargo from time to time to conform their records to those of the owners.

In time the complicated accounting methods employed by Mar-Trade and Cargo resulted in fantastically high debit and credit balances with respect to the Judgment Debtor and the Third Parties, balances which bore no relationship whatsoever to their actual cash positions.

Furthermore, it was shown that Cargo's Agency Account, which included funds of all vessels for which it acted as agent, numbering some forty to fifty, never contained a cash balance of $1,800,000 or any like amount, the average monthly cash balance in Cargo's Agency Ac-

count for all of the vessels it managed usually amounting to approximately $55,000 or $60,000.

The inaccuracies, errors and duplications under Cargo's bookkeeping and accounting system again came up for discussion in 1959 following the sale of the vessel "Santa Despoina" by San George and in connection with the preparation of financial statements for the Judgment Debtor and the Third Parties by their New York accountants for the fiscal period ended March 31, 1959. Said accountants gave instructions to Cargo to correct its records relating to the Judgment Debtor and the Third Parties. As is inevitable in any audit, particularly where shipping interests are concerned, retroactive entries had to be made to correct Cargo's accounts so as to bring such records into conformity with the records of the Judgment Debtor and the Third Parties. These instructions were given as soon as the financial statements were prepared and prior to the entry of the Koufopantelis, et al. judgment against the Judgment Debtor, notice of which was not received by the Judgment Debtor until July, 1959 when a subpoena *duces tecum* in supplementary proceedings was served on Mar-Trade. It is true that some of the adjusting entries in Cargo's books were not actually made until July 24, 1959, a date prior to the service of a subpoena *duces tecum* on Cargo. No significance can be attached to this failure to make some of the adjusting entries until July, 1959, however, since it was established that Cargo's records showed that as of June 30, 1959 the Judgment Debtor had a credit of approximately $400., whereas the Judgment Debtor owed Cargo $16,286.03.

The applicable provisions of the Civil Practice Act of the State of New York governing the payment of judgments by third parties are set forth at length at pages 21a-24a of the Appendix hereto.

It has been well settled by the decisions of the New York courts that a third party cannot be summarily directed to pay the judgment of a judgment debtor if there is an issue of fact as to whether or not the third party is indebted to said judgment debtor. *Pouley* v. *Dorland Building Co.*, 281 N. Y. 423, 24 N.E. 2d 109 (1939) and *Berkson* v. *Schneiderman*, 7 Misc. 2d 214, 160 N. Y. S. 2d 78 (Sup. Ct. 1957). Upon a showing of the existence of an issue of fact, the judgment creditors are left to the remedy of instituting a plenary action against the third parties under §795 of the New York Civil Practice Act. In proceedings of this nature, the United States District Court has followed the decisions of the New York courts. See *Fried* v. *Cano*, 171 F. Supp. 254, 257 (S.D. N.Y. 1959), wherein the court stated:

> "Where a third party's affidavit presents a factual issue as to whether the third party owes money to the judgment debtor, an order compelling payment should be denied."

See also *Kerckafric (Pty.) Ltd.* v. *Maxwell Meyers Affiliations, Ltd., et al.*, 108 F. Supp. 594, 595 (S.D. N.Y. 1952), wherein the court stated:

> "The law is clear that under this section and its predecessor, Section 2446 of the former N. Y. Code of Civil Procedure, no such order may be made if a genuine issue of fact appears from the papers or affidavits with respect to whether or not any money is owned by the third party to the judgment debtor or the amount of such debt, if any. *Kenney* v. *South Shore Natural Gas & Fuel Co.*, 1911, 201 N. Y. 89, 94 N. E. 606; *Broderick* v. *Stecher*, 1941, 177 Misc. 270, 29 N. Y. S. 2d 825; *Pouley* v. *Dorland Bldg. Co., Inc.*, 1939, 281 N. Y. 423, 24 N. E. 2d 109; *Bank of United States* v. *Canal Securities Corp.*, 1st Dept., 1937, 250 App. Div. 505, 294 N. Y. S. 760; *Foley* v. *Foley*, 1st Dept., 1939, 257

> App. Div. 154, 12 N. Y. S. 2d 85. Indeed, the judgment creditor's brief does not seriously controvert this, but merely categorizes the third party's contention that there are no monies owing as 'preposterous'. But the third party's president, Mr. Bernstein, has submitted an affidavit which, if true, directly places in issue the fact as to whether any monies are owing by the third party to the judgment debtor. An issue of fact thus presents itself and the motion must, accordingly, be denied."

If any one point was clearly presented by the record before the Court of Appeals it was that the Third Parties denied any indebtedness to San George, the Judgment Debtor. The record presented to the court below consisted in part of some sixty-odd printed pages of affidavits submitted by the parties, replete with the conflicting claims of the Judgment Creditors and the Third Parties. In addition, the confused picture which emerged from the third-party examinations with respect to the accounting practices of Mar-Trade and Cargo and the financial interrelationships of San George and the Third Parties should have served to further indicate the existence of a bona-fide factual dispute. Thus there unquestionably was an issue as to the alleged indebtedness of the Third Parties to the Judgment Debtor which properly required a trial in the District Court for its determination.

It may be noted at this point that a motion for the relief prayed for by the Judgment Creditors in the District Court i.e., an order directing third parties to pay a judgment, is strikingly parallel to a motion for summary judgment under the Federal Rules of Civil Procedure.

As has been repeatedly held, and to refer to but one much-cited case, *Dochler Metal Furniture Co.* v. *United States*, 149 F. 2d 130 (2d Cir. 1945), if there is the slightest doubt as to the facts, summary judgment should

be denied. In the *Doehler* case the complaint was dismissed on a motion for summary judgment and, in reversing and remanding, the Court of Appeals observed at pages 135, 136:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A Litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But, although a prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. Cf. Arenas *v.* United States, 322 U. S. 419, 429, 433, 64 S. Ct. 1090, 88 L. Ed. 1363. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered. Sartor *v.* Arkansas Natural Gas Corporation, 321 U. S. 620, 624, 64 S. Ct. 724, 88 L. Ed. 967, tells us that, especially where, as here, damages are in question, the courts should go slow about making haste by a summary judgment; there the Supreme Court said that 'at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.'"

In light of the foreging it is respectfully urged that the Court of Appeals for the Second Circuit should have reversed the decree of the District Court in the Koufopantelis et al. supplementary proceedings and remanded the case to the District Court for trial.

CONCLUSION

Because of the need for an interpretation of the applicability, scope and interrelationship of Admiralty Rules 28 and 39 with respect to the taking of proof on defaults and the setting aside of judgments entered on default, and because of the difference of opinion within the Court of Appeals for the Second Circuit with respect to the nature and extent of the proof which must be presented so as to establish the existence of a triable issue of fact in proceedings supplementary to judgment, petitioners respectfully pray that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Order of Palmieri, J.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

A.D. 189-272

In the Matter of Supplementary Proceedings:

IOANNIS KOUTOPANTELIS, NICOLAOS GILLAS, NICOLAOS GREGOS, MATHEOS FRANGAKIS, VASILIOS FERENDINOS, APOSTALOS KARITOS,

Judgment Creditors.

against

CIA. DE NAV. SAN GEORGE, S.A.,

Judgment Debtor.

The judgment creditors herein having previously duly recovered a final decree in admiralty in this Court on the 16th day of June, 1959, in the amount of $38,362.58 against the judgment debtor, Cia. De Nav. San George, S.A., and the said decree having thereafter been docketed as a judgment of this Court on the 17th day of June, 1959, and the said judgment remaining entirely unsatisfied, and the judgment creditors having moved this Court pursuant to the provisions of Rule 69 of the Federal Rules of Civil Procedure and Section 794 of the Civil Practice Act of the State of New York, by a notice of

motion directed to and duly served personally upon the judgment debtor and the third parties, Santa Maria Shipowning & Trading Company, S.A., Cia. De Navegacion San Martine, S.A., Panathena Trading & Shipowning Company, Saint John Shipping & Trading Corporation and Cargo & Tankship Management Corporation, for an order directing the said third parties to pay to the judgment creditors the amount of the judgment herein with interest, and with costs of these proceedings, and the said motion having duly come on to be heard before me on the 9th day of March, 1960, in open court.

And the judgment creditors having appeared by their attorney, Isaac Salem, Esq., by Herbert Lebovici, Esq., of counsel, and the third party, Cargo & Tankship Management Corporation, having appeared by their attorneys, Alfange & Friedman, Esqs., by Phillip Friedman, Esq., of counsel, and all the other said parties having appeared by Chadbourne, O'Neil & Thomson, Esqs., by John B. Whelan, Esq., of counsel, and all of said counsel having been heard,

And, upon reading and filing the notice of motion herein and the attached affidavit of Herbert Lebovici, sworn to the 18th day of January, 1960, together with the exhibits attached thereto, lettered A through M, in support of said motion, the opposing affidavits of P. A. Margaronis, sworn to the 2nd day of February, 1960, and of Locke Grayson, sworn to the 10th day of February, 1960, both read in opposition on behalf of the judgment debtor and Santa Maria Shipowning & Trading Company, S.A., Cia. De Navegacion San Martine, S.A., Panathena Trading & Shipowning Company and Saint John Shipping & Trading Corporation, and the opposing affidavits of Demetrios Dritsas, sworn to the 10th day of February, 1960, and of Albert Marks, sworn to the 10th day of Feb-

ruary, 1960, together with exhibits numbered 1 through 6A, read on behalf of the third party, Cargo & Tankship Management Corporation, and the reply affidavit of Herbert Lebovici, sworn to the 25th day of February, 1960, and the additional affidavits of Albert Marks, sworn to the 2nd day of March, 1960 and John B. Whelan, both sworn to the 2nd day of March, 1960, read in behalf of the said respective third parties.

And the transcripts of the examination in Supplementary Proceedings heretofore conducted herein of Mar-Trade Corporation and Cargo & Tankship Management Corporation, by Demetrios Dritsas, Harold Nilson and Albert Marks, of Elias Kulukundis; and of the judgment debtor, Santa Maria Shipowning & Trading Company, Cia. De Navegacion San Martine, S.A., Panathena Trading & Shipowning Company, Saint John Shipowning & Trading Company and Elam Shipping Corporation, all by Pandelis A. Margaronis.

And, it appearing to my satisfaction herein, and the Court having found from the said papers and oral argument that the said third party, Cargo & Tankship Managment Corporation, is indebted to the said judgment debtor in the sum of more than $1,800,000.00; that between January 31, 1959 and July 24, 1959, the judgment debtor had a continuous balance to its credit on the books of Cargo & Tankship Management Corporation in excess of $1,800,000.00; that on or about July 24, 1959, on the instructions of P. A. Margaronis, acting as agent of all of the third parties except Cargo & Tankship Management, all of the said third parties distributed on the books of Cargo & Tankship Management Corporation, the judgment debtor's credit balance of $1,800,000.00 and particularly assigned $68,243.82 thereof to Cia. De Navegacion San Martine, S. A., one of the third parties herein,

assigned $312,540.45 to the third party, Panathena Trading & Shipowning Company and assigned $753,564.11 to Santa Maria Shipowning & Trading Company, S. A., and it further appearing herein that all of said transferred credits were respectively received by the said third party corporation and were made without any consideration whatsoever to the judgment debtor; that said transfers of the assets of the judgment debtor were made at a time when the said judgment debtor was indebted to the judgment creditors herein; that prior to the said transfers that there was no indebtedness due or claimed to be due from the judgment debtor to any of the said third parties; that the said transfers to said third parties disposed of all the assets of the judgment debtor and thereby rendered it insolvent; that the said transfers of credits were void, illegal and fraudulent as to the judgment creditors herein; that the said transfers constituted an illegal dividend and/or distribution of the funds of the judgment debtor, and due deliberation having been had,

Now, on motion of Isaac Salem, attorney for the judgment creditors, it is

ORDERED, that this motion be and the same hereby is granted, and it is further

ORDERED, that the said third parties herein, Cargo & Tankship Management Corporation, Panathena Shipowning and Trading Company, Cia. de Navegacion San Martine, S.A. and Santa Maria Shipowning and Trading Company, S.A., be, and they are hereby directed, jointly and severally, to pay over to the judgment creditors herein the sum of $38,362.58, the amount of the judgment herein, together with interest thereon to the 9th day of March, 1960, in the sum of $1,675.16, amounting in all to the sum of $40,037.74, together with costs consisting of

the sum of $386.17, the judgment creditor's disbursements herein and an additional allowance of $1500.00/100, pursuant to the terms of Section 803 of the Civil Practice Act of the State of New York, making in all the total sum of $41,923.91. Forty-one thousand, nine-hundred and twenty-three dollars and ninety-one cents.

Dated: New York, New York,
March 11th, 1960.

EDMUND L. PALMIERI
U. S. D. J.

Opinion of John M. Cashin, U. S. D. J., dated August 2, 1960

KOUFOPANTELIS *et al.* v. CIA. DE NAV. SAN GEORGE

These are motions to open the default in each of the subject actions.

In the four libels, 14 alien seamen, former members of the crew of the S/S "SANTA DESPO," seek recovery for overtime wages pursuant to the laws of Panama, liquidated damages under 46 U. S. C. §596 and 597 for withheld wages, penalty under the laws of Panama because of the change of the country of registration of the vessels, and damages for breach of the vessel's articles. That all of the claims are within the subject matter jurisdiction of this court is clear. *Monteiro* v. *Sociedad Maritime San Nicholas, S.S. etc.*, decided June 29, 1960 (2 Cir.) Docket No. 25978. In two of the actions an attorney appeared on behalf of respondent but in none of them was an answer ever interposed. In all of the actions a decree for a sum certain was entered by default. No question is raised as to the court's jurisdiction over the person of the respondent. One of the actions, namely, *Bardis* v.

Cia. De Nav. San George, S.A., Ad. 187-41, is slightly different from the others in that damages for personal injuries are also requested. As to the personal injury claim, judgment in favor of the libellant was entered but an inquest ordered on the issue of damages.

Libellants strongly argue that Admiralty Rule 39(1) is applicable since the decrees, with the exception of the Bardis decree with respect to personal injuries, are final. Thus, libellants argue further, the court lacks jurisdiction to entertain the motion since more than 60 days have elapsed since the entry of the decrees. Respondents urge that Admiralty Rule 28(2) is applicable and thus the court has jurisdiction to entertain a motion since there is no time limitation under Admiralty Rule 28.

I will not attempt to determine this contested issue since, in any circumstance, I believe that the respondent has not made sufficient showing to warrant the opening of the defaults. In any case, civil or admiralty, whether the judgment or decree be final or interlocutory, a showing of a meritorous [*sic*] defense is necessary before the default will be opened(3); and that rule is applicable to admiralty proceedings.(4) Respondent attempts to demon-

(1) Reopening default decrees:
The court may, in its discretion, on motion of the respondent or claimant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within 60 days after the decree has been entered, the respondent or claimant submitting to such further orders and terms in the premises as the court may direct; and the term of the court shall be deemed extended for this purpose until the expiration of such period of sixty days.

(2) Default on failure to answer:
If the respondent or claimant shall omit or refuse to make due answer to the libel upon the return day of the process, or other assigned by the court, the court may pronounce him to be in contumacy and default and thereupon shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may set aside the default and upon the application of the respondent or claimant admit him to make answer to the libel on such terms as the court may direct.

(3) 49 C.J.S. Judgments § 290.

(4) *North American Continental Co.* v. *The El Cuis* (EDNY 1952) 107 F. Supp. 436.

strate meritorous [*sic*] defenses by asserting that the claims must, of necessity, be overvalued because settlement at a small percentage of the amounts of the decrees was agreed to by libellants, and by referring to the execution by libellants of general releases when they signed off the vessel. Neither of these proposed defenses has at all been shown to be meritorous [*sic*].

Respondent states in each of the moving papers that—

> "* * * it is obvious that the libel herein is typical of the proceedings instituted by discharged seamen for grossly exaggerated claims for unpaid wages, in virtually all of which recoveries, whether by settlement or by trial, are but for small fractions of the amounts originally claimed: * * *."

Perhaps a study of all the libels filed by alien seamen for unpaid wages would prove that most claims have been exaggerated. I am, however, constrained to decide these motions on the basis of the records before me and not upon any general knowledge of what has happened in other similar cases. *MacGong* v. *Brownell* (9 Cir. 1954) 209 F. 2d 448. The only evidence cited by respondent in an effort to show that the claims are highly inflated is the fact that libellants had agreed to a settlement figure which is a small fraction of the amount of the decrees. Such a settlement agreement, however, could well have been impelled by the fact that former counsel for respondent implied strongly that any decree obtained would not be collectible since on September 29, 1958 he wrote to libellants' attorney, in part, as follows:—

> "As we have repeatedly told you over the telephone, at the time that this action was referred to us, the company which was the owner of the S.S. Santa Despo had gone out of business, the vessel itself was sold and from what we have been able to learn recently, is presently wallowing in

mud flats in a foreign country and will probably never sail the seas again."

We are thus left with the conclusion that the only consideration tending toward a finding that the claims are highly inflated is the bald statement of respondent's counsel that they must be because all of such claims are highly inflated. Such a statement does not establish the existence of a meritorous [*sic*] defense.

The second argued [*sic*] for defense has also not been shown. It is hornbook law that one who would seek to avail himself of the benefits of a release obtained from a seaman has the burden of showing that the seaman has not been overreached.(5) All the respondent has shown on these motions is that libellants have executed releases. Not one shred of evidence supporting the voluntariness of the releases has been submitted.

Since there is no showing of a meritorous [*sic*] defense, the motions to open up the defaults of the wage claims are denied.

The personal injury claim in the *Bardis* action stands on a different footing, however, from the wage claims. Clearly, Admiralty Rule 28 applies and the court has jurisdiction to entertain the motion since the decree is interlocutory. The respondent has shown, at least *prima facie*, a meritorous [*sic*] defense because Bardis, at the time of the discharge from the vessel, was examined by a doctor in San Francisco and found fit for duty. He was then taken to New York at the expense of respondent and examined by another doctor, who reached the same conclusion. Whatever laches the respondent might be guilty of the libellant is equally guilty of since the ordered inquest has never been taken. Accordingly, the respond-

(5) *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942). See also 46 U.S.C. § 600.

ent may be relieved from the default to the extent that it may contest damages at any inquest which may subsequently be taken. This relief from the default is contingent on respondent posting an undertaking in the amount of $5,000 to cover a possible decree on the personal injury claim.

The motions are disposed of as indicated above.

An order shall be settled on each motion.

Dated: New York, N. Y.,
August 2nd, 1960.

/s/ John M. Cashin
United States District Judge

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 174-5-6-7 and 134—October Term, 1960.

(Argued January 4, 1961 Decided May 26, 1961.)

Docket Nos. 26526-7-8-9 and 26288

Ioannis Koufopantelis, *et al.*,
Libellants-Appelees,

v.

Cia. de Nav. San George, S.A.,
Respondent-Appellant.

FANORIOS PANTELOGLOU,
Libellant-Appellee,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Respondent-Appellant.

DIAMANTIS DRAKOPOULOS, *et al.*,
Libellants-Appellees,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Respondent-Appellant.

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SPIRIDON BARDIS,
Libellant-Appellee,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Respondent-Appellant.

IOANNIS KOUFOPANTELIS, *et al.*,
Judgment Creditors-Appellees,

v.

CIA. DE NAV. SAN GEORGE, S.A.,
Judgment Debtor,

SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., *et al.*,
Third Party-Appellants.

Before—

LUMBARD, Chief Judge,

WATERMAN and HAND, Circuit Judges.

Appeal from four orders in admiralty of the District Court for the Southern District of New York, Cashin, J.,

presiding, denying motions to vacate four decrees in favor of the libellants taken by default, and from a decree by Judge Palmieri summarily finding that third party ship-owning-corporations were indebted to the judgment debtor.

JOHN B. WHALEN for the appellants.

HERBERT LEBOVICI for the appellees.

PHILIP A. FRIEDMAN for the Third Party-Appellant Cargo & Tankship Management Corporation.

A. DANIEL FUSARO
Clerk

1916

HAND, Circuit Judge:

These are appeals from four decrees of Cashin, J., in suits in admiralty, each refusing to reopen decrees taken by default in favor of the libellants in four suits to recover seamen's wages. There were six libellants in each of two of the suits and one libellant in each of the other two. In all the suits the claims were for wages, statutory penalties for delay in payment of wages, unlawful discharge or other claims for the payment of specified sums of money, not necessary to state. In a libel filed by Bardis alone a claim was joined for personal injuries due to the respondent's neglect to give him medical treatment. The libellants had all been members of the crew of respondent's ship, "Santa Despo," registered in Panama at the time when the claims arose. The libels were filed and the respondent served in December 1955 and October 1956, but the respondent did not answer in any of the suits and the libellants took final decrees by default on April 30, 1959

and June 17, 1959. On May 20, 1960, the respondent moved in each of the suits to reopen the defaults and to be allowed to answer. Judge Cashin denied the motions, but modified the decree in the Bardis suit by requiring the respondent as a condition of contesting the amount of the damages "to file a bond of $5,000 as security for any decree entered upon such inquest."

Admiralty Rule 28 provides that, if the respondent fails to answer the libel on the return day of the process, the court may pronounce him to be "in contumacy and default," and may then "proceed to hear the cause ex parte"; or it "may set aside the default" and allow the respondent to answer "on such terms as the court may direct." Rule 39 cuts down to 60 days any motion of the respondent to "rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him." These two rules mean that, if the respondent has failed to answer, the court may proceed to dispose of the case without notice, or may allow him to answer; but Rule 39 gives the court discretion to rescind a decree that has pronounced him in default within a period of sixty days after the default decree has been entered. Thus, applied to the suits at bar nothing could be done after sixty days to change the decrees entered on default, which had unconditionally declared that the libellants should recover the amounts fixed in the decrees themselves. That part of the decree in the Bardis suit that refused to rescind the imposition of liability for neglect to give Bardis medical care was subject to the same rule; as was the reservation of any liquidation of the amount of damages. The condition that the respondent must file a bond as security was within the court's discretion, especially in the light of the allegations that the respondent had been removing its assets from the district.

It is true that Judge Cashin did not rely upon Rule 39 as an answer to the respondent's motion, but decided it on what he conceived to be the inadequacy of the defense presented, particularly the allegations that the libellants had given releases of any claim at the time they were discharged from the ship. Nevertheless, Rule 39 did apply, for there is nothing in the words quoted that confines it to final decrees. Moreover, we cannot see why with the exception of the Bardis decree the decrees were not final. As we have said, they were for the recovery of a fixed sum of money, and constituted the final action of the court in disposal of the libels. Rule 39 was as complete a bar to any relief under Rule 28 as though the Rule had been a statute; it was an answer to the motion regardless of the merits of the defenses that might have been available. So far as *Afghan Motor Co.* v. *The M. V. Silverash,* 46 F. Supp. 306, decides to the contrary we cannot concur.

Six of the libellants in one of the suits at bar claim the right to collect their decree in that suit from several other corporations by a supplementary proceeding under §794 of the New York Civil Practice Act, which Rule 20 of the Admiralty Rules makes "available" to suits in admiralty. They allege that the respondent, the San George Company, had assets formerly in the possession of another corporation, which we shall call "Cargo," which "Cargo" paid to other shipowning corporations (the "third party ships") in fraud of the libellants' claims in suit. "Cargo" and these shipowners, they assert, are liable for money paid in fraud of themselves, as judgment creditors of the San George Company. They demanded judgment upon their claims which Judge Palmieri granted. The situation is complicated and the motion was decided upon depositions and affidavits. The facts, so far as we can understand them, were as follows. The respondent—The San George Company—owned two ships, not only the "Santa Despo," but

the "Santa Despoina," the management of all of whose local transactions was entrusted to a corporation, by the name of "Mar-Trade." "Mar-Trade" acted as agent, not only of the ships, "Santa Despo" and "Santa Despoina," but of other ships collectively known as the "Santa Group," and owned by corporations of which the San George's shareholders were also shareholders. Each month "Mar-Trade" sent a statement to each corporation showing a detailed account of receipts and disbursements. On December 31, 1958, the agency of "Mar-Trade" was cancelled, but the same powers were granted to "Cargo." Thereafter "Cargo" accounted for the ships "Santa Despo" and "Santa Despoina" in the same way as "Mar-Trade" had done. Already in 1955 the San George Company had sold the "Santa Despo," and late in 1958 or early in 1959, it sold the "Santa Despoina" for more than $800,000, and the amount of both [illegible] George Company in "Cargo's" account for the month of June 1959. However, on July 31, 1959, in this account the credit for the "Santa Despoina" had disappeared, a debit of over $12,000 had been substituted, and the credit for the "Santa Despo" had become only $405. The only explanation offered for these changes is that they were made by "auditors" appointed by the owners of seven or more of the ships that "Cargo" was managing as the "Santa Group," and that they showed the true obligations of the Santa Group *inter se*.

The question on which the validity of the summary judgment depends is as follows All the ships in the "Santa Group" were owned by separate corporations of which, however, two Greek citizens were also shareholders, and all local transactions that involved these ships were left for decision to an agent in New York who was a relative of these shareholders. This agent acted as ship's husband for all Santa ships through "Cargo," and allocated the debits and credits apparently at the direction of this agent,

but, as we may assume, under the supervision of the two Greek shareholders.

On June 30, 1959 "Cargo" remitted to the respondent, San George Company, one of the "Santa Ships," an account showing a credit of over a million dollars for the "Santa Despoina" but in the account for July 31, 1959, this item was replaced by a debit of more than $12,000. This, as the libellants maintain, was enough to justify the conclusion that "Cargo" had diverted to the other members of the "Santa Group" more than enough cash to pay the judgment of the libellants and to justify a summary judgment, not only against "Cargo," but against these corporations. "Cargo" denies that it received any part of the proceeds of the "Santa Despoina," except as an agent for the San George Company, and alleges that all that it did receive it paid to the "third party" corporations under authority of all the Santa Group. Accordingly, "Cargo" claims to be liable only to the Santa Group and to them only for a balance of $15,000 as shown by their books. "Cargo" does not attempt to allocate this sum among the group.

Out of the tangle of rights and obligations in which the two Greek shareholders involved their dealings it is extremely difficult to make any distribution of these payments. However, it appears to my brothers that on this record the libellants proved that the proceeds from the sale of the "Despoina" were deflected from the creditors of the San George Company without consideration and in fraud of the libellants, judgment creditors of that company. It seems to me that the relations between the corporations owning the "Santa Ships" were too complicated to decide summarily and I think that the decree in the summary proceeding should be reversed and the issues should be remanded to the district court for trial as that court may decide.

The judgments affirming the libellants' judgments against the San George Company are unanimously affirmed. The order in the summary proceeding directing the "third party shipowning corporations" to pay the decrees is affirmed by a majority vote. The order directing "Cargo" to pay the libellants is reversed. The order requiring the respondent to post a bond is affirmed. All the orders involved, even if any be interlocutory, are appealable under §1292(3), Title 28.

LUMBARD, Chief Judge (concurring in part, and writing for the majority in part):

Judge Waterman and I agree fully with our senior that Judge Cashin's refusal to reopen the default decrees in favor of libellants was proper since San George was on notice that the decrees had been entered; we also agree notice that the decrees had been entered; we also agree that the order in the summary judgment proceeding directing "Cargo" to pay the libellants should be reversed. We think, however, that the other order in the summary proceeding directed to the "third party shipowning corporations" which ordered them to satisfy the libellants' judgment should be affirmed since the corporations' allegations fall short of creating a "genuine issue of fact" which only a trial could resolve.[1] Their half-hearted, contradictory

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(1) The proceeding against the third parties was brought under §794 of the New York Civil Practice Act, applicable in the district court by virtue of Rule 69(a) of the Federal Rules of Civil Procedure. The statute, as construed, requires that there be a trial whenever there is a "genuine issue of fact." *Kerckafric Ltd.* v. *Maxwell Meyers Affiliations, Ltd.*, 108 F. Supp. 594, 595 (S. D. N. Y. 1952).

Section 794 states that the court "must grant" an order requiring payment by the third party to the judgment creditor "if it shall appear to the satisfaction of the court [that the third party is indebted to the judgment debtor] unless the said third party * * * shall show such facts as may be deemed by the court sufficient to entitle [him] to a trial." The New York courts have held that this means that a trial is required where there is a "real controversy" but not where the plaintiff's right is "substantially undisputed," *Kenney* v. *South Shore National Gas & Fuel Co.*, 201 N. Y. 89 at pp. 92 and 93 (1911); cf. *Bank of United States* v. *Canal Securities Co.*, 250 App. Div. 505, 294 N. Y. S. 760 (1st Dept. 1937). This seems to us to be a standard identical to the "genuine issue of fact" rubric prescribed for the summary judgment procedure, F. R. C. P. 56(c), with which we are more familiar and so it was held in *Kerckafric, supra.*

and imprecise affidavits do not amount to an allegation that San George was indebted to them.

It is admitted, or cannot be challenged, that Compania De Navegacion San George (San George), the respondent in the main action, sold the Santa Despoina for $907,000.00 in early January of 1959. This sum was deposited in an account at the First National City Bank and over a two-month period it was transferred by Pandelis A. Margaronis to the Santa Despoina's account with "Cargo." Since the ship was no longer operating for San George, its account remained quite static and on June 30, 1959 its balance with Cargo was over $1,830,000. But by the end of July, quite another story was told on the books of Cargo, for the Santa Despoina was then shown to be indebted to it by over $12,000. Partial beneficiaries of the depletion of the $1,830,000 balance of the Santa Despoina were the balances that the "third party shipowning corporations" had with $1,830,000 balance o Santa Maria Shipowning and Trading that the "third par $753,564.11; to the Panathena Trading "Cargo." To the Corporation went $312,540.45, and bene- Corporation went 32 was Compania De Navegacion San and Shipowning C fited by $68,243.32 Martine.

The following chronology is also clear from the record: On June 17, 1959, the judgment debtors' default decrees were entered and on July 20, 1959, the third parties first became aware of the default judgments against their sister corporation when Martrade Corporation was served with a third-party subpoena. Four days later, on July 24, 1959, Cargo's books were changed.

The third parties now contend that the changes made on Cargo's books merely reflect San George's debt to its sister corporations. The third parties, however, have not made a single meaningful allegation to support this claim. Neither a hint of how such obligations came into being nor a

straight-forward assertion that such obligations existed have they made.

Indeed, when Pandelis A. Margaronis, whose brother was the corporations' principal stockholder and who served as the New York manager, first was questioned, his deposition was that he personally knew of no debts owing from San George to her sister corporations. His later vague and off-hand suggestion that "[the corporations] might have inter-company transactions which have taken place abroad * * * and they might give them to us so that we will adjust them," is an interesting speculation but hardly sufficient to create an issue of fact for trial. Equally ephemeral and insufficient is the affidavit of Locke Grayson, an accountant who was retained by Pandelis Margaronis, that the changes were made to "adjust the balances in [the Cargo accounts] * * * to conform * * * with the correct balances as stated in the books of said corporations." The books could have reflected San George's agreement to make a transfer without consideration just as well as some debt owing from San George to its sisters. Surely if there were such debts owing, the shipowning corporations should have set forth some of the underlying facts surrounding their creation. It is no excuse that they have destroyed their books, as Pandelis A. Margaronis asserts, and thus may no longer be able to recall their past dealings.

The third parties had it in their power to state the facts with respect to any debt that San George might have owed them and it was incumbent upon them to be explicit; inconclusive and vague assertions are not enough to create an issue of fact. As the third parties have failed to make any explanation of the facts alleged by the plaintiffs, we treat those facts as if they were true.

Without a genuine claim that the changes in the Cargo accounts were made on account of obligations previously incurred by San George and owing to the third parties,

Judge Palmieri's finding that the third parties are indebted to San George was quite proper. If, as Cargo claims, the shipping corporations were treated as a group and if the third parties had debit balances on Cargo's books before the changes, the existence of a credit balance for San George and a debit balance for the third party corporations would reflect debts owing from the third parties to San George. If the corporations were treated as a group but a third party had a credit balance, transferral of San George's balance to it would give it the cause of action that San George had had against whatever shipowning corporations had debit balances. Such a transaction, rendering San George insolvent, *Cohen* v. *Benjamin*, 246 App. Div. 866 (3d Dept. 1936); *Berndt* v. *Berndt*, 192 Misc. 57, 60 (S. Ct. Onondaga Cty.), would be a fraudulent conveyance under the New York Debtor and Creditor Law §273, *cf.* §270, which creates a cause of action in the defrauded creditors under §278. On the other hand, if each shipowning corporation were treated by Cargo as a separate entity, the transaction would similarly be in fraud of creditors though it would be a fraudulent transfer of a cause of action against Cargo rather than of a cause of action against whatever shipowning corporations had negative balances.

The Santa Maria Shipowning and Trading Company, Compania De Navegacion San Martine, and Panathena Trading and Shipowning Company therefore must pay enough of what they owe to San George to satisfy the plaintiff's judgment against San George.

WATERMAN, Circuit Judge, concurring in part in the opinion of Judge Hand and concurring in full in the opinion of Judge Lumbard:

I concur in the portion of Judge Hand's opinion that Judge Lumbard states he and I concur in. Otherwise, I concur in the opinion of Judge Lumbard.

46 U.S.C. § 596. Time for payment

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4529; Dec. 21, 1898, c. 28, §§ 4, 26, 30 Stat. 756, 764; Mar. 4, 1915, c. 153, § 3, 38 Stat. 1164.

46 U.S.C. § 597. Payment at ports

Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipu-

lations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 596 of this title: *Provided further*, That notwithstanding any release signed by any seaman under section 644 of this title any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: *And provided further*, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4530; Dec. 21, 1898, c. 28, § 5, 30 Stat. 756, 764; Mar. 4, 1915, c. 153, § 4, 38 Stat. 1165; June 5, 1920, c. 250, § 31, 41 Stat. 1066.

Section 794 of the Civil Practice Act of the State of New York

794. Order permitting or directing person indebted to pay debt to sheriff or judgment creditor.

1. At any time after the commencement of a special proceeding authorized by this article, the court, upon proof by affidavit to its satisfaction that a person or corporation is indebted to the judgment debtor, whether such indebtedness is matured or unmatured, and upon such a notice given to such persons as it deems just, or without notice, may make an order, permitting the person

or corporation to pay a sheriff designated in the order a sum on account of the alleged indebtedness, not exceeding the sum which will satisfy the judgment or execution, or to pay to the judgment creditor a sum on account of the alleged indebtedness not exceeding the judgment with interest, unless a receiver has been appointed or a receivership has been extended to the special proceeding, and in that case to the receiver.

2. At any time after the commencement of a special proceeding authorized by this article, the judgment creditor may by notice of motion served either personally or as the court may direct, upon the judgment debtor and such third party as described in the preceding subdivision of this section, apply to the court for an order directing the said third party to pay to the judgment creditor, unless a receiver has been appointed or a receivership has been extended to the special proceeding, and in that case to the receiver, a sum on account of the alleged indebtedness not exceeding the judgment with interest. If it shall appear to the satisfaction of the court that the said third party is indebted to the judgment debtor the court must grant such an order unless the said third party or judgment debtor shall show such facts as may be deemed by the court sufficient to entitle the said judgment debtor or third party to a trial of the issues in an action brought by the judgment creditor or a receiver of the judgment debtor or any claimant to said indebtedness. If the indebtedness is unmatured, the order shall direct that payment be made on the date when the indebtedness shall mature. Disobedience of an order granted pursuant to this subdivision may not be punished as a contempt, but the said order may, at any time after five days from the entry thereof, be docketed as a judgment and shall be enforceable as such, except that if the order directs that payment

be made on a future date, it shall not be docketed as a judgment until after five days from such future date.

3. A payment thus made under either an order permitting such payment or directing it, is, to the extent thereof, a discharge of the indebtedness, except as against a transferee from the judgment debtor in good faith and for a valuable consideration of whose rights the third party had actual or constructive notice prior to the entry of the order.

SECTION 795 OF THE CIVIL PRACTICE ACT OF THE STATE OF NEW YORK

§795. Action by judgment creditor against third party. Where it appears from the examination or testimony taken or other proof satisfactory to the court that a person or corporation is indebted to the judgment debtor, the court may make an order authorizing the judgment creditor to maintain an action against such person or corporation for the recovery of such debt. Such order may also forbid the transfer or other disposition of such debt until an action can be commenced and prosecuted to judgment and may direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of such action be delivered to the creditor or impounded in court. Such order or the judgment entered in the authorized action may provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment, costs, disbursements and expenses allowed by the court. Such action by a judgment creditor against the debtor of the judgment debtor shall make the judgment debtor a party defendant, and costs shall be awarded as prescribed by law; but if judgment be in favor of the judgment creditor and against the debtor of the judgment debtor, and the debtor of the judgment

debtor did not dispute the indebtedness, then costs are not to be awarded against the debtor of the judgment debtor.

Admiralty Rule 20. Execution on decrees

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulators. And any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees.

Admiralty Rule 28. Default on failure to answer

If the respondent or claimant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court may pronounce him to be in contumacy and default and thereupon shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may set aside the default and upon the application of the respondent or claimant admit him to make answer to the libel on such terms as the court may direct.

Admiralty Rule 39. Reopening default decrees

The court may, in its discretion, on motion of the respondent or claimant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within sixty days after the decree has been entered, the respondent or claimant submitting to such further orders and terms in the premises as the court may

direct; and the term of the court shall be deemed extended for this purpose until the expiration of such period of sixty days.

Admiralty Rule 43. Reference to commissioners

In cases where the court shall deem it expedient or necessary for the purposes of justice, it may refer any matters arising in the progress of the suit to one or two commissioners or assessors, to be appointed by the court, to hear the parties and make a report therein. And such commissioners or assessors shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

Rule 69(a), Federal Rules of Civil Procedure

Rule 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

SUPREME COURT, U. S.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 335

CIA. DE NAV. SAN GEORGE, S.A., SANTA MARIA SHIPOWNING & TRADING COMPANY, S.A., CIA. DE NAVEGACION SAN MARTINE, S.A., and PANATHENA TRADING & SHIPOWNING COMPANY,

Petitioners,

vs.

IOANNIS KOUFOPANTELIS, *et al.*,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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September 14, 1961

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vs.

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Respondents.

RESPONDENTS' BRIEF

Statement

The petitioner, Cia De Nav. San George, S.A. (hereinafter called San George) seeks leave to appeal from orders of the Court of Appeals affirming four decisions (5a-9a)* and orders of United States District Judge Cashin (Court of Appeals Docket Nos. 26,526-7-8-9) denying motions to vacate decrees previously rendered against the said petitioner. The Court of Appeals opinion is Reported at 291 F 2d, 907.

Petitioners, San George, Santa Maria Shipowning & Trading Company, S.A., Cia. De Nav. San Martine, S.A. and Pan Athena Trading & Shipping Company, seek to review a separate and different order made, pursuant to the law of the State of New York, by the District Court (1a-5a) and affirmed (16a-19a) by the Court of Appeals (Court of Appeals Docket No. 26,288), granting a judgment against each of them for diverting and receiving assets of San George in an amount sufficient to satisfy one of the above decrees (Koufopantelis) that Judge Cashin had refused to reopen.

Question 1

The first issue on which certioriari is sought relates to an alleged discrepancy between the interpretations previously given by the Federal Courts to Admiralty Rules 28 and 39 of the Supreme Court Admiralty Rules and the decision made by the Court of Appeals herein.

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* References numbered from 1a to 30a are to pages of the Appendix to the Petition herein; pages 82a to 89a are to Appendix to Brief of Appellees in Court of Appeals, Docket Nos. 26,526-7-8-9.

The four decrees were filed respectively on June 16, 1959 (84a), June 16, 1959 (85a) and two on April 30, 1959 (86a). As may be seen by an inspection of the said decrees they were, in all respects, final decrees (84a-86a), with the possible exception of one provision in the Bardis decree, and with that one we are not concerned here Although petitioner was represented by counsel (5a, 7a, 56a), the decrees herein were entered on SAN GEORGE's default after petitioner had deliberately and calculatedly permitted the entry of such default decrees (56a) in the belief that the appellees would be unable to effectuate collection of the amounts of such decrees.

On July 20, 1959, (p. 12, Brief of Santa Maria, etc. Docket #26288 in Court of Appeals) the appellees instituted proceedings supplementary to judgment for the collection of the said four decrees by the service of a subpoena in supplementary proceedings. Although time still permitted the taking of an appeal from each of the said decrees, and time still permitted an application to be made pursuant to the provisions of Rule 39 of the Supreme Court Admiralty Rules for an order vacating two of the said decrees, no effort was made to obtain the modification or reversal of the said final decrees. Instead, the petitioners herein entered upon a vigorous opposition to the collection of the said decrees, an opposition that terminated with the making of Judge Palmieri's order of March 21, 1960, and the decision of Judge MacMahon of March 20, 1961. (Appendix A hereof).

It was only when it appeared to the said petitioner. from the order of Judge Palmieri of March 21, 1960 (87a), that

the said decrees were in fact collectible, that the applications to vacate the decrees were made by notice of motion dated May 17, 1960 (27a-28a) and heard on June 14, 1960 (6a). Thus, petitioner waited in two cases for more than thirteen months to seek to vacate the said decrees and in the remaining two, more than eleven months.

The rules here in question, Rules 28 and 39 of the Admiralty Rules of the Supreme Court, have been in effect in substantially their present form since their enactment as former Rules 29 and 40, respectively, in 1842 (Act of August 23, 1842, c. 188; 5 Stat. 516). During all the intervening time, the administration and interpretation of the two rules has been uniform and consistent up to (the claim of the petitioner to the contrary notwithstanding) and including the decision of the Court of Appeals herein sought to be reviewed.

Pursuant to such uniform construction of the two rules, Rule 28 is not here applicable, because same has always been held to apply to interlocutory or non-final decrees, whereas the decrees herein were final. Where a respondent has been adjudged in default, but the case is still "*in fieri*" (*Storey* v. *Storey*, 221 Fed. 262, 263), the case remains open until the damages may be assessed in order that a final decree may be entered. *U. S.* v. *One Chrysler Sedan*, 46 F. Sup. 897, 898; *Afghan Motor Co.* v. *The Silverash*, 46 F. Sup. 306, 308; *The Bella*, 270 Fed. 287, 288; *Storey* v. *Storey*, 221 Fed. 262, 263; *The Dredge A*, 217 Fed. 617, 622. Obviously, since the case remains open until a final decree is entered, there need be no limitation of the time within which a respondent may seek to vacate a default, since the case is still pending.

However, for the same reasons, once the damages have been assessed and a final decree entered, then the applicable Rule is 39.* *Benedict on Admiralty,* 6th Ed. Vol. 2, states, at page 419,

> "Therefore when a defendant has been pronounced in contumacy and default and the libel has been adjudged to be taken *pro confesso* against him, the court may, in its discretion, set aside the default. That power is to be construed in connection with General Admiralty Rule 39 under which, within sixty days after the entry of the final decree on default, the court, in its discretion, upon motion of the respondent or claimant and payment of costs, may rescind the decree. But after the period prescribed by the rules has elapsed, the court has no power to open or rescind the decree in default cases, the power of the court to open a final decree entered. . . ."

Without exception, the Courts have held, up to and including the decision of the Court of Appeals herein, that on the expiration of the 60 days provided in Rule 39, the Court is divested of power or jurisdiction to make an order with respect to the said final decree. *Mariners Service, Inc.* v. *Dunns Marine Railway, Inc.,* 181 Fed. 2d 596, 597; *United States* v. *One 1941 Chrysler Sedan,* 46 Fed. Sup. 897, 898; *The Bethlehem,* 4 Fed. 2d, 308, 311; *The Duiveland,* Fed. Cas. 4122. The Court will immediately recognize that Rule 39 is but an extension of the long standing rule of the Federal Courts, which holds that an application to vacate or modify a final decree or judgment must

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* In the instant cases, the decrees were "for the recovery for a fixed sum of money and constituted the final action of the court in disposal of the libels and as such were final" (13a).

be made at the term of the Court in which the decree is rendered. *United States* v. *Mayer,* 235 U. S. 55; *Wetmore* v. *Karrick,* 205 U. S. 141; *Phillips* v. *Negley,* 117 U. S. 665; *Bronson* v. *Schulten,* 104 U. S. 410; *Brooks* v. *Railroad,* 102 U. S. 107; *The Martha,* Fed. Cas. 9144 p. 866; *Snow* v. *Edwards,* Fed. Cas. 13145; *Petit* v. *One Steel Lighter,* 104 Fed. 1002. In Rule 39 the "term" rule is extended by the provision that the term is deemed to be extended for a period of 60 days after the entry of the decree thus effectively enlarging the time limitation.

Having chosen to contest the collection of the decrees in supplementary proceedings, rather than to appeal the decrees herein or to seek a modification within the time permitted by Rule 39, the petitioners are now forced to eschew any claim for relief pursuant to Rule 39, and to claim, instead, the right to seek it under Rule 28. That Rule 28 is inapplicable because the decrees here are final rather than interlocutory, has not prevented the petitioner from so urging. Indeed the petition herein states, at p. 10 thereof, that the judgments entered herein "must be deemed interlocutory in nature and subject to the provisions of admiralty Rule 28 alone . . ." It is solely for this reason that the petitioner here urges this Court to "deem interlocutory" what are otherwise indisputably final decrees (12a, 13a, 84a-86a).

In order to make a case for the granting of certiorari, the petitioner alleges that the Court of Appeals has for the first time herein held that the provisions of Rule 28 are, in fact, "restricted" by those of Rule 39 and that, accordingly, after the expiration of the 60 day period set

forth in Rule 39, the District Court is powerless to exercise the discretion granted it by Rule 28. This misreading of the decision of the Court of Appeals arises from wishful thinking. The Court of Appeals herein has said no more or differently than has always been the rule: that after Rule 39 became applicable by reason of the entry of final decrees, then the 60 day provision thereof became applicable and the Court powerless on the expiration of 60 days to affect the result. Thus, Judge Hand stated (12a):

> ". . . but Rule 39 gives the Court discretion to rescind the decree that has pronounced him in default within a period of sixty days after the default decree has been entered."

In discussing Rules 28 and 39 and holding that both related to defaults and to opening such defaults, the said decision further stated that Rule 39 contains the additional proviso of the sixty-day time limitation. Construing the same in conjunction with the instant case and continuing the uniform construction of the relationship of Rules 29 and 39, Judge Hand stated: "Thus, applied to the suits at bar nothing could be done after sixty days to change the decrees entered on default", because such decrees "had unconditionally declared that the libellants should recover the amounts fixed in the decrees themselves" (12a).

Clearly, the prevailing opinion held, in keeping with the jurisprudence on the subject, uniform for the last 119 years, that the instant decrees were final, and therefore controlled by the sixty-day provision of Rule 39.

In referring to the District Court opinion of Judge Cashin, Judge Hand took occasion to note that the former had failed to pass upon the finality of the respective decrees and, therefore, upon the relationship of Rules 28 and 39 to the instant case. He noted, also, that the petitioner's application in the District Court had been denied in the exercise of Judge Cashin's discretion on the bases of inadequate merits and of proposed defenses.

In doing so, he pointed out that the "quoted" portions of both Rules 28 and 39 (12a) did not confine either rule to "final" decrees *in haec verba.* It is a portion of Rule 39 not "quoted" by Judge Hand that contains the sixty-day provision as Judge Hand points out.

By reference out of context to a later sentence in this opinion, petitioners now claim (petition p. 7) that Judge Hand ruled that the sixty-day proviso of Rule 39 was applicable to both rules, and, allegedly therefore in some conflict with the previous jurisprudence.

That such claim is wishful thinking is apparent not only from the fact that Judge Hand immediately states that Rule 39 does apply and that the decrees were final (13a) but from petitioners' own statement that it would have the Court "necessarily" call white, black, and these undisputedly final decrees "deemed interlocutory" to accomplish the result petitioner seeks (petition p. 10).

Actually, Judge Hand nowhere states that the sixty-day provision of Rule 39 is also applicable to Rule 28, and in the absence thereof, the entire basis of petitioners' application fails. Properly read, the opinion states no more than the long established rule that when Rule 39 has be-

come applicable because of the entry of a final decree, then the sixty-day provision, likewise, becomes applicable, regardless of what might have been the situation prior to the interlocutory decrees being superseded by final decrees.

No reason for the granting of certiorari is presented in this respect.

Question 2

The second issue sought to be raised, even more lacking in merit for purposes of certiorari than the first, presents only a question of State, and not Federal, law.

Section 794 of the Civil Practice Act of the State of New York provides so far as relevant:

> "At any time after the commencent of a special proceeding authorized by this article, the judgment creditor may by notice of motion served . . . upon the judgment debtor . . . such third party . . . apply to the court for an order directing the said third party to pay to the judgment creditor, . . . a sum on account of the alleged indebtedness not exceeding the judgment with interest. If it shall appear to the satisfaction of the court that the said third party is indebted to the judgment debtor the court must grant such an order unless the said third party or judgment debtor shall show such facts as may be deemed by the court sufficient to entitle the said judgment debtor or third party to a trial of the issues in an action brought by the judgment creditor . . ."

After the entry of the final decrees herein and the institution of supplementary proceedings on July 20, 1959, it appears that the petitioner, San George, together with the other petitioners, the third parties, San Martine, Santa Maria and Panathena, had diverted over $1,800,000 which the remaining third party, Cargo and Tankship Management Corporation, owed to the debtor, San George. This was effected by changing the books of Cargo and Tankship Management Corporation so as to show that it owed the money to the other corporations, Santa Maria, San Martine and Panathena, rather than to the debtor, San George. Such fraudulent transfers were made without any claim of consideration therefor or any indication of any right on the part of the said Santa Maria, Martine or Panathena to receive the same (17a).

The appellees thereupon moved in the *Koufopantelis* case only (Court of Appeals Docket #26288) before Judge Palmieri for an order pursuant to §794 directing the said third party recipients of the San George money to pay to the judgment creditors an amount sufficient to satisfy the decree in that case. Judge Palmieri's order made findings of all the facts essential to the making of an order under the provisions of the said §794 of the New York State Civil Practice Act (3a-4a).

The Court of Appeals herein affirmed the said order of Judge Palmieri and the finding that neither the judgment debtor (San George) nor the third parties (the other petitioners) had "shown such facts as might be deemed by the court to entitle [either] to a trial of the issues . . ." (16a-19a).

Subsequent to the order of Judge Palmieri in the *Koufopantelis* case, and prior to the affirmance of that order by the Court of Appeals, a similar application was made to another District Judge in each of the other three cases (Appendix A). There, Judge MacMahon, on March 21, 1961, and prior to the decision of the Court of Appeals in the *Koufopantelis* case (Court of Appeals Docket #26288), a formal opinion on practically identical papers and exhibits as were before Judge Palmieri, again made the same findings, holding that the same petitioners had failed to show facts such as to entitle them to a plenary trial. Such decision of Judge MacMahon, though not presently before this Court, so lucidly expounds the identical lengthy, if not complicated, facts that were found by Judge Palmieri and the Court of Appeals in the *Koufopantelis* case, that an extract thereof is attached hereto as Appendix A.

The instant application but repeats the naked and factually unsupported contentions that were urged before Judge Palmieri, the Court of Appeals and Judge MacMahon, all of whom found that none of the petitioners had sustained the burden cast upon them of showing "facts" that would entitle them under §794 to plenary trial.

Whether or not facts were shown within the meaning of §794, so as to warrant a trial instead of a disposition on motion, is purely a matter governed by the law of the State of New York. No federal question is presented nor is there any indication that the decision herein constituted any deviation from the customary application of the referable laws of the State of New York.

No reason for the granting of certiorari is presented here either.

CONCLUSION

The application for certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents

HERBERT LEBOVICI
Of Counsel

APPENDIX

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The third parties next contend that the judgment creditors have failed to show the existence of the debt. In support of this, they point to the fact that they did not even examine the third parties in the instant supplementary proceeding. Rather, the judgment creditors rely on examinations conducted earlier in a companion case, *Koufopantelis* v. *Cia de Nav. San George, S.A.*, Ad. 189-272, in which a motion identical to the one under consideration was granted on March 9, 1960.*

The earlier examination was necessarily limited to the books and records maintained by Cargo & Tankship, the judgment debtor's disbursing agent, since the records of the judgment debtor and the shipowning third parties had been sent to Greece and destroyed.

In addition to that suspect conduct, the examination did reveal that as of January 1, 1959 Cargo & Tankship's records showed a credit of over $1,000,000 owing to the judgment debtor. On January 4, 1959, the judgment debtor sold its ship, the Santa Despoina, and received $860,000 cash over and above the mortgage on the vessel. This money was deposited in the judgment debtor's account at the First National City Bank on January 5. Between that date and January 26, Margaronis withdrew $805,000 from the debtor's bank account, and that sum was added to the existing credit of the debtor on the books of Cargo &

* An appeal taken from the order entered on that motion is presently pending before the Court of Appeals.

Tankship. Thus, the total amount owed by Cargo & Tankship as of January 31 was over $1,800,000. On April 30, that debt was still shown on the books of Cargo & Tankship. On that same day, two judgments aggregating $12,601.75 were entered against the judgment debtor. A month later, on May 31, 1959, the books of Cargo & Tankship still showed a credit to the judgment debtor of over $1,800,000. Two weeks later, on June 16, a third judgment in the amount of $39,220.96 was entered against the judgment debtor. The credit of over $1,800,000 on the books of Cargo & Tankship remained in existence until July 23, but it was evaporated on the following day by a mere book entry in the Cargo & Tankship journal which transferred $1,131,000 of the credit away from the judgment debtor to the shipowning third parties.*

The third parties have not shown, and indeed do not even claim, that the judgment debtor received any consideration whatever for the transfers to them. Rather, they vaguely explain the July 24 transfer as an "auditor's adjustment" necessitated by a balancing of mutual accounts maintained by Cargo & Tankship for the "Santa" group of vessels.

According to the affidavit of Cargo & Tankship's secretary, there was actually one account for all the ships in the "Santa" group, and the only figure of any significance, according to him, was the net balance for all the ships. The net balance due the owners of all the Santa ships, as

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* Cia de Nav. San Martine received a credit of $68,423.82; Panathena Trading & Shipowning Company, $312,540.45; and Santa Maria Shipowning & Trading Corporation, $753,564.11.

of June 30, 1959, was only $843.39, and on July 31, 1959, it was $20,166.69.

The statement that the shipowners had a mutual account, however, fails to explain how a debt of over a million dollars, $805,000 of which consisted of cash withdrawals from the judgment debtor's bank account, could be dissipated and transferred without consideration to the third parties without creating an obligation to the judgment debtor. The plain fact remains that on January 1, 1959, the judgment debtor had an ocean-going vessel; that on January 4, 1959, it had over $800,000 in cash; that in April and June of 1959, the judgments involved here were entered against the debtor; that until July 23, it was credited with $1,800,000 on Cargo & Tankship's books; and that on July 24, 1959, it had neither vessel, cash, nor credit.

Under the applicable New York law, the assets of a corporation are subject to the rights of its creditors, who may reclaim them from transferees who have taken without adequate consideration. Section 15, New York Stock Corporation Law; Section 60, New York General Corporation Law; Section 273, New York Debtor and Creditor Law; *American Surety Co.* v. *Conner*, 251 N. Y. 1, 12, 166 N.E. 783 (1929); *Bartlett* v. *Drew*, 57 N. Y. 587 (1874).

A mere recitation of the facts garnered from Cargo & Tankship's records impels the conclusion that the transfer to the third parties was fraudulent. Clearly, they constituted a violation of the rights of the judgment debtor's creditors and overwhelmingly establish that the third parties are indebted to the judgment debtor in amounts far in excess of the judgments in these actions.

The third parties also contend that any indebtedness owing to the judgment debtor at the time of the Koufopantelis examinations conducted in the fall of 1959 may not have been in existence on September 26, 1960 when these proceedings were instituted. In support of their conjecture, they point to the fact that a supersedeas bond, posted on April 1, 1960 in the Koufopantelis action, removed any restraint on further transfers. In short, they contend that a debt in existence on April 1, 1960 may have been satisfied or, at any rate, the court cannot find, without further evidence, that the debt still existed on September 26, 1960.

This contention ignores the explicit requirement of Section 794 that third parties present facts, not speculation, which negate the judgment debtor's evidence of the existence of a debt.* The affidavits of the representative of the third parties are utterly lacking in such evidentiary facts. *Cf., Radio City Music Hall Corp.* v. *United States,* 135 F. 2d 715, 718 (2 Cir. 1943).

Accordingly, the court finds that the third parties are presently indebted to the judgment creditors in amounts in excess of their respective judgments. The motions are therefore granted. Submit orders.

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* ". . . If it shall appear to the satisfaction of the court that the said third party is indebted to the judgment debtor the court must grant such an order unless the said third party or judgment debtor shall show such facts as may be deemed by the court sufficient to entitle the said judgment debtor or third party to a trial. . . ."